

**BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA**

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APPLICATION TO CHANGE WATER RIGHT) NO. 76H-30103343 BY WATSON) CONSTRUCTION COMPANY INC.)	PRELIMINARY DETERMINATION TO GRANT CHANGE
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On November 10, 2015, Watson Construction Company Inc. (Applicant) submitted Application to Change Water Right No. 76H-30103343 to change Water Right Claim No. 76H-5200-00 to the Missoula Regional Office of the Department of Natural Resources and Conservation (Department or DNRC). The Department published receipt of the Application on its website. The Department sent Applicant a deficiency letter under §85-2-302, Montana Code Annotated (MCA), dated April 22, 2016. The Applicant responded with information dated June 22, 2016. The Application was determined to be correct and complete as of September 16, 2016. The Department met with the Applicant's representative Tracey Turek of Water Rights Research LLC on May 18, 2016. An Environmental Assessment for this Application was completed on January 9, 2017.

INFORMATION

The Department considered the following information submitted by the Applicant.

Application as filed:

- Form 606
- Change in Place of Storage Addendum
- Attachments
- Photos of the conveyance system
- Maps:
- 2013 aerial photos depicting location of the pond(s), irrigated acres and conveyance system
- USDA Aerial Photo No. 179-136 dated August 2, 1979 showing irrigated acreage

Information Received after Application Filed:

- Change Application Deficiency Response dated June 20, 2016 and received June 22, 2016

Information within the Department's Possession/Knowledge

- Water Right Claim File No. 76H-5200-00
- 1958 Ravalli County Water Resource Survey field notes
- Environmental Assessment dated January 9, 2017

The Department has fully reviewed and considered the Environmental Assessment and evidence and argument submitted with this Application and **preliminarily determines** pursuant to the Montana Water Use Act (Title 85, chapter 2, parts 3 and 4, MCA) as follows.

WATER RIGHT TO BE CHANGED

FINDINGS OF FACT

1. Applicant seeks to change his portion of Statement of Claim No. 76H-5200-00 by adding three places of storage, reducing the irrigated acres and adding the purposes of recreation and stock. The claim lists a flow rate of 1.52 cubic feet per second (CFS) from an unnamed tributary of Threemile Creek identified as waste and seepage water for irrigation of 40 acres. The period of diversion and period of use are listed as April 15 to October 15. The claimed point of diversion is located in the SWNENE of Section 12, T9N, R20W, Ravalli County. The 40 acre place of use, of which the Applicant owns 20 acres, is located in the SWSW of Section 1, T9N, R20W, Ravalli County. The place of use is located approximately 4 miles northeast of the town of Stevensville, MT. Claimed elements of the water right proposed for change are presented in the following table:

Table 1: WATER RIGHTS PROPOSED FOR CHANGE

WR Number	Purpose	Flow Rate	Period of Use	Point of diversion	Place of use	Priority date	Acres
76H-5200-00	Flood Irrigation	1.52 cfs	4/15 to 10/15	SWNENE Section 12, T9N, R20W	SWSW Section 1, T9N, R20W	7/2/1971	40

2. Statement of Claim Nos. 76H-107459-00 and 76H-107461-00 are Supply Ditch water rights that include the claimed 40 acre place of use for 76H 5200-00. These water rights are owned by Supply Ditch Association (Supply Ditch) and have service areas of 5,500 and 1,100

acres, respectively, covering multiple parcels including Applicants. The Applicant owns shares of the Supply Ditch Association water rights. There are no proposed changes to Supply Ditch Association irrigation district water rights.

CHANGE PROPOSAL

FINDINGS OF FACT

3. The Applicant proposes to add three places of storage and the purposes of stock and recreation, and retire 10.4 irrigated acres from his portion of the place of use.
4. The Applicant owns 19.3 of the 39.3 historically irrigated acres (FOF No. 12) and proposes to add three storage reservoirs with a combined surface area of 2.6 acres for the purposes of stock and recreation. The combined capacity of the storage reservoirs is 7.69 AF, with individual capacities being 6.40 AF, 1.05 AF and 0.24 AF. The Applicant will retire 10.4 historically irrigated acres and use the water previously diverted and consumed on those acres to supply water to the reservoirs.
5. The storage reservoirs are located within the historical place of use for irrigation in the SWSW of Section 1, T9N, R20W, Ravalli County.
6. The 10.4 acres to be retired from irrigation are already converted to non-irrigated uses, including the reservoirs which were constructed by a previous landowner on the ditch that historically conveyed irrigation water to the place of use. This application was filed as the result of a water use complaint received by Missoula Regional Office on May 9, 2013, and Applicant is seeking to come into compliance with Montana Water Use Act. The Applicant is the final water user on the ditch and with the exception of the addition of the recreation and stock reservoirs, current irrigation practices will remain unchanged on the remaining 8.9 acres of historic irrigated lands owned by Applicant (19.3 ac – 10.4 ac = 8.9 ac). The period of diversion and period of use will remain April 15 to October 15.



CHANGE CRITERIA

7. The Department is authorized to approve a change if the applicant meets its burden to prove the applicable § 85-2-402, MCA, criteria by a preponderance of the evidence. Matter of Royston, 249 Mont. 425, 429, 816 P.2d 1054, 1057 (1991); Hohenlohe v. DNRC, 2010 MT 203, ¶¶ 33, 35, and 75, 357 Mont. 438, 240 P.3d 628 (an applicant's burden to prove change criteria by a preponderance of evidence is "more probably than not."); Town of Manhattan v.

DNRC, 2012 MT 81, ¶8, 364 Mont. 450, 276 P.3d 920. Under this Preliminary Determination, the relevant change criteria in §85-2-402(2), MCA, are:

(2) Except as provided in subsections (4) through (6), (15), (16), and (18) and, if applicable, subject to subsection (17), the department shall approve a change in appropriation right if the appropriator proves by a preponderance of evidence that the following criteria are met:

(a) The proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued under part 3.

(b) The proposed means of diversion, construction, and operation of the appropriation works are adequate, except for: (i) a change in appropriation right for instream flow pursuant to 85-2-320 or 85-2-436; (ii) a temporary change in appropriation right for instream flow pursuant to 85-2-408; or (iii) a change in appropriation right pursuant to 85-2-420 for mitigation or marketing for mitigation.

(c) The proposed use of water is a beneficial use.

(d) The applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use or, if the proposed change involves a point of diversion, conveyance, or place of use on national forest system lands, the applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water. This subsection (2)(d) does not apply to: (i) a change in appropriation right for instream flow pursuant to 85-2-320 or 85-2-436; (ii) a temporary change in appropriation right for instream flow pursuant to 85-2-408; or (iii) a change in appropriation right pursuant to 85-2-420 for mitigation or marketing for mitigation.

8. The evaluation of a proposed change in appropriation does not adjudicate the underlying right(s). The Department's change process only addresses the water right holder's ability to make a different use of that existing right. E.g., Hohenlohe, at ¶¶ 29-31; Town of Manhattan, at ¶8; *In the Matter of Application to Change Appropriation Water Right No.41F-31227 by T-L Irrigation Company* (DNRC Final Order 1991).

HISTORIC USE AND ADVERSE EFFECT

FINDINGS OF FACT - Historic Use

9. Applicant proposes to add three places of storage and the purposes of stock and recreation by retiring 10.4 irrigated acres from his portion of Statement of Claim 76H-5200-00. Applicant will continue to use the full flow rate and diverted volume to provide for continued

irrigation of 8.9 acres and provide for one fill and evaporation for the three reservoirs. There are no changes proposed to the period of diversion or period of use.

Place of Use

10. The claimed place of use for Statement of Claim 76H-5200-00 is 40 acres in the SWSW of Section 1, T9N, R20W, Ravalli County. The claimed 40-acre place of use was comprised of lots 13, 14, 15 and 16 of Sunnyside Orchards subdivision. The priority date for Statement of Claim 76H-5200-00 is July 2, 1971 which post-dates the 1958 Ravalli County Water Resources Survey. The Water Resource Survey map does not show lot 13 as irrigated. Irrigation of lot 13, using waste and seepage water, was developed after the survey was completed. The Water Resources Survey Field notes for the area indicate 32 acres of irrigation using Supply Ditch Association water, with 21.9 of the 32 acres located within the lots 14, 15, and 16. The remaining 10.1 acres irrigated by Supply Ditch Association water were located on lot 17, outside of the claimed place of use for 76H-5200-00. Using ArcMap and the Water Resource Survey polygons, the Department calculated the following acreages irrigated per lot within the 40-acre claimed place of use for Supply Ditch water: lot 13, 0.0 acres; lot 14, 5.8 acres; lot 15, 8.1 acres; lot 16, 8.0 acres.

11. The DNRC claims examination report dated 10/26/1989 found 37 of the claimed 40 acres irrigated using the August 2, 1979 USDA aerial photograph number 179-136. The claim was reexamined by DNRC on 4/5/2005 and 39.3 irrigated acres within the 40-acre claimed place of use were verified as irrigated.

12. At some point after the Water Resources Survey was conducted, field improvements were made to level the land and the irrigated acreage within the 40-acre claimed place of use was increased by 17.4 acres to a total of 39.3 irrigated acres. It is reasonable to assume that the increased irrigation came from development of waste and seepage water which has a 1971 priority date. The 1979 aerial photograph shows that 3.9 acres of additional land was irrigated on lots 15 and 16, bringing the total for those two lots to 20 acres. The 1979 aerial photograph shows 19.3 acres irrigated on lots 13 and 14. Water Resources Survey shows 5.8 acres on Lot 14 irrigated by Supply Ditch Association water. Between 1958 and 1979 irrigated acreage on lots 13 and 14 increased by 13.5 acres, which the Department attributes to waste and seepage water development. The Department finds the primary source of water for each lot to be as

follows, with the understanding that the waste and seepage water right provided additional water to acres that had previously only been irrigated with Supply Ditch water:

<u>Irrigation at the 39.3-acre Place of Use</u>					
	Lot 13	Lot 14	Lot 15	Lot 16	TOTAL
Supply Ditch	/	5.8	8.1	8.0	21.9
76H-5200-00	9.3	4.2	1.9	2.0	17.4
Total Irrigated Acres	9.3	10.0	10.0	10.0	39.3

13. Waste and seepage water is collected and conveyed in the same ditch used to convey irrigation district water and the two sources are co-mingled. It is impossible to distinguish which acres are irrigated using each source other than to calculate the increased irrigated acreage from 1958 and 1979. Because the claimant indicated that waste and seepage water was used to irrigate the entire place of use and it is clear that the flow rate and volume applied per acre increased with the addition of waste and seepage water, the Department will consider there to be a supplemental relationship between Supply Ditch water and waste and seepage water on the 21.9 acres shown as irrigated in the Water Resources Survey.

14. Based on review of the 1979 USDA aerial photograph, the Department finds 39.3 acres historically irrigated for Statement of Claim 76H-5200-00, with 17.4 acres irrigated exclusively with waste and seepage water and the remaining 21.9 acres irrigated through a combination of irrigation district and waste and seepage water.

Flow Rate

15. The originally claimed flow rate for Statement of Claim 76H-5200-00 is 6.00 CFS. The flow rate was changed to 1.52 CFS during claims examination based on 17 GPM per acre for 40 acres per standards for reviewing claims based on filed notices of appropriation ($17 \text{ GPM/acre} \times 40 \text{ acres} \times 1 \text{ CFS}/448.8 \text{ GPM} = 1.52 \text{ CFS}$). Waste and seepage water was historically used to augment the number of acres being irrigated and supplement Supply Ditch water from Supply Ditch Association.

16. The Water Resources Survey field notes state that 275 shares in the Supply Ditch Association were used to irrigate 32 acres, including 21.9 acres within the 39.3 acre place of use for Statement of Claim No. 76H-5200-00. Five shares in the Supply Ditch Association equals one miner's inch of water, with 275 shares equaling 55 miner's inches, or 617.1 GPM ($55 \times 11.22 \text{ GPM} = 617.1 \text{ GPM}$). To calculate the flow rate per acre provided to the place of use

from Supply Ditch shares, 617.1 GPM was divided by 32 acres to arrive at a GPM/acre figure ($617.1 \text{ GPM} \div 32 \text{ acres} = 19.3 \text{ GPM/Acre}$). This figure was then multiplied by the 21.9 acres irrigated with Supply Ditch water to arrive at a total of 422.3 GPM.

17. Statement of Claim No. 76H-5200-00, which was put to use in July of 1971, provided 1.52 CFS (682.2 GPM) to the 39.3-acre place of use. This waste and seepage water right was comingled with Supply Ditch shares for a total flow rate of 1,104.5 GPM, or 28.1 GPM/acre ($(422.3 \text{ GPM} + 682.2 \text{ GPM}) \div 39.3 \text{ acres} = 28.1 \text{ GPM/acre}$), which is reasonable for flood irrigation. Prior to development of waste and seepage water, the flow rate per acre for the 21.9 acres irrigated with Supply Ditch irrigation was 19.3 GPM. With the development of waste and seepage water, the application rate increased to 28.1 GPM/acre, with waste and seepage supplying an additional 8.8 GPM/acre on the 21.9 original acres and 28.1 GPM/acre on the 17.4 new acres. The waste and seepage water right increased application rates for acres irrigated with Supply Ditch water by 31.4% and supplied the newly irrigated 17.4 acres with 100% irrigation for a uniform application of 28.1 GPM/acre over the 39.3 acre place of use.

18. The Applicant provided flow measurements taken in the three drain ditches used to collect waste and seepage water during the 2015 irrigation season. The Applicant measured 100 GPM in the eastern drain ditch and 300 GPM in the south drain ditch, while no measurement was taken in the northern drain ditch due to lack of waste water flowing in that ditch when the measurements were taken. Although 400 GPM was measured during the 2015 irrigation season, the nature of the waste and seepage source is such that the Applicant cannot control upgradient irrigation or the amount of waste water flowing in the ditch.

19. The amount of Supply Ditch water capable of reaching the place of use is limited by an 18-inch culvert in the ditch. This ditch is upgradient of the three drain ditches that capture waste and seepage water (FOF No. 18). Flow rate capacity for this culvert was calculated by the Department to be 6.10 CFS. A measurement of the ditch taken at a point below the culvert conveying Supply Ditch water and the drain ditches that capture waste and seepage and shows that the ditch is capable of conveying the Applicant's portion of Supply Ditch water (422.3 GPM) and waste and seepage water (682.2 GPM). Based on ditch measurements, the Department finds that the flow rate of 1.52 CFS is reasonable.

20. The combined flow rate per acre for Supply Ditch and waste and seepage water is 28.1 GPM/acre (FOF No. 17). The Applicant owns 19.3 of the 39.3 acres, of which 13.5 acres are irrigated with waste and seepage water only and the remaining 5.8 acres are irrigated with

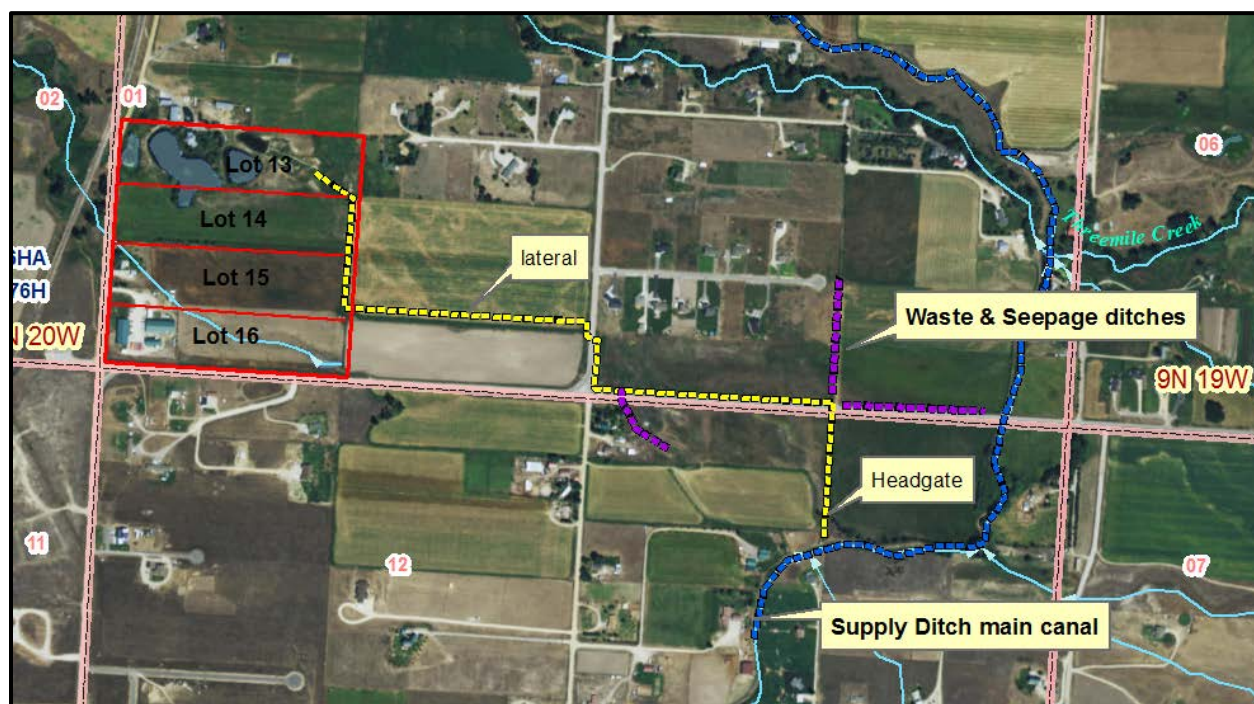
Supply Ditch and waste and seepage water. The Applicant's proportional flow rate for Supply Ditch water, which is based off of a per acre flow rate of 19.3 GPM/acre, is 111.9 GPM ($19.3 \text{ GPM/acre} \times 5.8 \text{ acres} = 111.9 \text{ GPM}$). The Applicant's proportional flow rate for waste and seepage water, which is based off of 100% service on 13.5 acres and 31.4% service on the remaining 5.8 acres, is 430.6 GPM ($(28.1 \text{ GPM/acre} \times 13.5 \text{ acres} = 379.4 \text{ GPM}) + (28.1 \text{ GPM/acre} \times 5.8 \text{ acres} \times 0.314 = 51.2 \text{ GPM}) = 430.6 \text{ GPM}$). The 31.4% percentage for the supplemental relationship between shares and waste and seepage (FOF No. 17) was calculated by dividing the flow rate provided by waste and seepage by the combined 28.1 GPM/acre flow rate. For example, on lot 14, waste and seepage provided 51.2 GPM of the total 163.0 GPM used on the 5.8 acres irrigated with both sources ($5.8 \text{ acres} \times 28.1 \text{ GPM/acre} = 163.0 \text{ GPM}$) ($51.2 \text{ GPM} \div 163.0 \text{ GPM} = 31.4\%$).

21. The Department finds historical flow rates for Statement of Claim 76H-5200-00 and Supply Ditch Association shares to be 1.52 CFS and 0.94 CFS, respectively. The Department finds the flow rate applicable to the Applicant's 19.3-acre portion of the historically irrigated acreage to be 1.21 CFS, 0.96 CFS (430.6 GPM) from the waste and seepage claim and 0.25 CFS (111.9 GPM) from Supply Ditch Association.

Point of Diversion and Conveyance Facilities

22. The claimed point of diversion (POD) for Statement of Claim 76H-5200-00 is listed as a pipeline. The claim form originally listed a headgate and a pipeline, but headgate was removed by DNRC during claims examination in 1989. It is unclear why a pipeline was listed on the claim form or why DNRC changed the means of diversion during the original claims examination. Per information provided by the Applicant and confirmed through aerial photography, the waste and seepage water collects in three drain ditches that empty into the main ditch used to convey Supply Ditch Association water to the place of use. The water collected in the three drain ditches are comingled with Supply Ditch irrigation water, providing a supplemental source of water to the Supply Ditch irrigation water. The shares of irrigation water supplied by Supply Ditch Association account for 0.94 CFS of water flowing in the ditch used for irrigation. Once waste and seepage water becomes available from upgradient irrigation on neighboring fields, it contributes an additional 1.52 CFS for irrigation at the historic place of use.

23. To demonstrate the conveyance system is capable of conveying both the claimed flow rate of 1.52 CFS and the 0.94 CFS of water purchased from the Supply Ditch Association, the Applicant provided ditch measurements. These measurements indicate that the turnout from the Supply Ditch Association canal located at the head of the ditch is 23 inches wide and 34 inches deep. Flow capacity, based on Manning's Equation and the ditch flowing at a depth of 32 inches at the turnout headgate, is 20.4 CFS. The Applicant provided ditch measurements taken at several different locations. As the ditch heads towards the place of use it gains capacity. At the point where the ditch reaches the 39.3-acre place of use, it is 39 inches wide and 30 inches deep; this is the widest point of the ditch. Using Manning's Equation, wetted ditch perimeter, and velocity, the maximum capacity of the ditch at this location was calculated to be 39.8 CFS.



Period of Diversion/Diverted Volume

24. The claimed period of diversion and period of use for Statement of Claim Nos. 76H-5200-00 is April 15th to October 15th. This period of diversion and period of use fall within the standard growing season of April 1st to October 31st for Climatic Area II where the place of use is located (ARM 36.12.112). During this timeframe, the Applicant typically irrigated over a 124

day period, from May 1 through September 1, annually. Supply Ditch Association typically diverts Bitterroot River water into their main canal on approximately April 15th. Water takes approximately two weeks to wet the canal and begin flowing at the Applicant's turnout where it is then diverted out of the main canal to a ditch system serving the Applicant and several other properties. Upon commencement of irrigation using Supply Ditch water, waste water is also generated and becomes available to the Applicant. The Applicant starts irrigating on approximately May 1st and continues to flood irrigate until September 1st. Waste water is still present in the ditch until mid-October or November 1st, after the Supply Ditch Association turnout headgate has been closed; however, it is not used by the Applicant for irrigation.

25. The volume of water historically diverted for the water right proposed for change was calculated by the Department per ARM 36.12.1902(10), which states the Department shall calculate historic diverted volume using the following equation: historic diverted volume = (historic consumptive use/on-farm efficiency) + conveyance loss. For the purpose of this calculation the Department used crop consumptive use of 50.0 AF (FOF 28 & 29), an on-farm efficiency of 60% for flood irrigation, and no conveyance loss due to the fact that this is a gaining ditch that collects waste water along its length. Using these parameters, historic diverted volume for the 39.3 irrigated acres using both sources of water, Supply Ditch and waste and seepage, is 83.3 AF ($50.0 \text{ AF} \div 0.60 = 83.3 \text{ AF}$), or 2.12 AF/acre. On acres irrigated with both sources of water, waste and seepage accounts for 31.4% of the diverted volume, or 0.67 AF/acre (FOF No. 20).

26. To arrive at diverted volume for Statement of Claim No. 76H-5200-00, the Department calculated the percentage of the total flow rate provided by Supply Ditch and the percentage provided by waste and seepage and applied those percentages to diverted volume for the 39.3 acre place of use. Waste and seepage provided 682.2 GPM, or 61.8% of the total flow rate ($682.2 \text{ GPM} \div 1,104.5 = 61.8\%$) while Supply Ditch water provided 422.3 GPM, or 38.2% of the total flow rate ($422.3 \text{ GPM} \div 1,104.5 \text{ GPM} = 38.2\%$). Therefore, the Department finds diverted volumes provided by Statement of Claim No. 76H-5200-00 and Supply Ditch to be 51.5 AF ($83.3 \text{ AF} \times 0.618 = 51.5 \text{ AF}$) and 31.8 AF ($83.3 \text{ AF} \times 0.382 = 31.8 \text{ AF}$), respectively.

27. To calculate diverted volume for the Applicant's 19.3-acre place of use, the Department applied the percentages used to arrive at their portion of the total flow rate on the 19.3 acre (FOF No. 25). The Applicant's proportion of diverted water for waste and seepage, which is

based off of 100% service on 13.5 acres and 31.4% service on the remaining 5.8 acres, is 32.5 AF ($(2.12 \text{ AF/acre} \times 13.5 \text{ acres} = 28.6 \text{ AF}) + (0.67 \text{ AF/acre} \times 5.8 \text{ acres} = 3.89 \text{ AF}) = 32.5 \text{ AF}$). The Department finds Statement of Claim 76H-5200-00 has a maximum historically diverted volume of 51.5 AF and the Applicant's portion of that historically diverted volume is 32.5 AF.

Consumptive Use

28. The Department calculated historical consumptive use for Statement of Claim No. 76H-5200-00 using data from the nearest weather station and monthly Irrigation Water Requirement (IWR) values for flood irrigation. Consumptive use figures are based on the 39.3-acre place of use, the Western Agricultural Research Station IWR value of 19.19 inches, Ravalli County management factor of 79.5%, and irrecoverable losses attributed to the irrigation method: 5% of total applied volume for flood irrigation.

29. Per ARM 36.12.1902(16), the volume of water that is consumptively used at the 39.3-acre irrigated place of use is 50.0 AF ($19.19 \text{ in/ac} \times 1 \text{ ft/12 in} \times 0.795 \times 39.3 \text{ acres} = 50.0 \text{ AF}$). Irrecoverable losses for flood irrigation are assessed at 5% of the applied volume which was calculated using a 60% efficiency value. The applied volume at the 39.3-acre place of use is 83.3 AF ($50.0 \text{ AF}/0.60 = 83.3 \text{ AF}$); irrecoverable losses account for 5% of the applied volume, or 4.2 AF ($83.3 \text{ AF} \times 0.05 = 4.2 \text{ AF}$). Total consumptive use of 54.2 AF for the 39.3 historically irrigated acres is calculated by adding crop consumptive use to irrecoverable losses ($50.0 + 4.2 = 54.2 \text{ AF}$). Evaporative losses from water as it moves through the ditch system was not calculated due to lack of information; this may be calculated in future change applications but will not be considered here as there are no proposed changes to that portion of the water delivery system. Future calculations may increase the total consumptive use of the water right considered under this change.

30. Due to the supplemental relationship between the Supply Ditch Association water and the waste and seepage water right, historical consumptive use was calculated by applying the percentage of flow rate provided by each source on each parcel to total consumptive use for the 39.3 acre place of use. Statement of Claim 76H-5200-00 (waste and seepage) provided 682.1 GPM to the 39.3 acre place of use while Supply Ditch water provided 422.3 GPM, or 61.8% and 38.2%, respectively. Applying these percentages to consumptive use per water right yields 33.4 AF for waste and seepage and 20.8 AF for Supply Ditch, totaling 54.2 AF. The

volume of consumptive use per parcel is calculated in the table below, in addition to flow rate and diverted volume:

	Waste and Seepage			Supply Ditch		
	Flow Rate (GPM)	Diverted Volume (AF)	CU Volume (AF)	Flow Rate (GPM)	Diverted Volume (AF)	CU Volume (AF)
Lot 13 (9.3 acres)	261.4	19.7	12.8	/	/	/
Lot 14 (10 acres)	169.2	12.8	8.3	111.8	8.4	5.5
Lot 15 (10 acres)	124.8	9.4	6.1	156.2	11.8	7.7
Lot 16 (10 acres)	126.7	9.6	6.2	154.3	11.6	7.6
Total (39.3 acres)	682.1	51.5	33.4	422.3	31.8	20.8

31. The Applicant's portion of historic consumptive use for Statement of Claim No. 76H-5200-00, calculated by adding the totals for Lots 13 and 14, is 21.1 AF (12.8 AF + 8.3 AF = 21.1 AF). The Department finds the total consumptive use for Statement of Claim No, 76H-5200-00 to be 33.4 AF.

32. The Department finds the following historic use for Statement of Claim No. 76H-5200-00:

<u>STATEMENT OF CLAIM NO.</u>	<u>SOURCE</u>	<u>PURPOSE</u>	<u>PRIORITY DATE</u>	<u>DIVERTED VOLUME</u>	<u>FLOW RATE</u>	<u>TOTAL ACRES</u>	<u>CONSUMPTIVE USE</u>
76H-5200-00	Waste and Seepage	Irrigation	7/2/1971	51.5 AF	1.52 CFS	39.3 Acres	33.4 AF

FINDINGS OF FACT – Adverse Effect

33. The Applicant owns 19.3 of the 39.3 historically irrigated acres and proposes to add three storage reservoirs with a combined surface area of 2.6 acres for the purposes of stock and recreation. The combined capacity of the storage reservoirs is 7.69 AF, with individual capacities being 6.40 AF, 1.05 AF and 0.24 AF. The Applicant will retire 10.4 historically irrigated acres from lots 13 and 14 and use the water historically diverted and consumed on those acres to supply water to the recreation and stock reservoirs. The Applicant proposes continued irrigation of his remaining 8.9 acres with Supply Ditch water and the remaining waste and seepage volume after the proposed change.

34. There are no proposed changes to the claimed period of diversion and use, point of diversion, flow rate, or diverted volume. The Applicant is the last user on that segment of the ditch with no other down-gradient water users after the Applicant's place of use.

35. The proposed reservoirs are located on lots 13 and 14 within the historic place of use for irrigation. The reduction in irrigated acres will offset new consumptive uses that arise from the development of the reservoirs; acreage proposed for removal has already been converted to new non-irrigated uses.

36. The Applicant's portion of historic consumptive use for Statement of Claim no. 76H 5200-00 is 21.1 AF (FOF No. 31). New consumptive use will come from evaporative losses off the reservoirs and stock use, both of which will occur between May 1 and September 15 annually. The reservoirs will have a combined surface area of 2.6 acres; resulting in evaporative losses of 6.45 AF annually ($2.6 \text{ acres} \times 2.48 \text{ AF/acre} = 6.45 \text{ AF}$). Evaporative losses were calculated using monthly average pan evaporation for the Western Agricultural Research Center in Corvallis, Montana. Monthly values were added for each month in the claimed period of diversion, April 15 to October 15, with the half the average value for October used. Evaporation was calculated through October 15 due to the fact that the reservoirs will remain full through the claimed period of diversion as the ditch continues to flow with waste and seepage water through the middle of October (FOF No. 24) The Applicant will continue to sprinkler irrigate 8.9 acres on lot 14 using Supply Ditch water and remaining waste and seepage water. The 10.4 acres taken out of irrigation was entirely irrigated using the waste and seepage right. The consumptive use for stock of 0.14 AF is calculated using DNRC standards of 0.17 AF per animal unit per year for 18 animals units being supplied water from the ponds between May 1 and October 15 (163 days). The total consumptive use for the proposed recreation and stock reservoirs is 14.3 AF ($7.69 \text{ AF capacity} + 6.45 \text{ AF evap.} + 0.14 \text{ AF stock} = 14.3 \text{ AF}$).

37. The 10.4 retired acres are located in lots 13 and 14 and consist of acreage irrigated entirely with the development of the waste and seepage water. All 9.3 acres in lot 13 and 1.1 acres in lot 14 will be retired, with the historic consumptive use of those acres attributed to Statement of Claim 76H 5200-00. The 9.3 acres retired in lot 13 provides 12.8 AF of historic consumptive use while the 1.1 acres retired in lot 14 provides 1.5 AF of historic use for a total of 14.3 AF. The proposed consumptive use for the recreation and stock reservoirs totals 14.3

AF. The Department finds that the proposed change in purpose and place of storage will not cause an expansion of consumptive use resulting in adverse effect.

38. Per ARM 36.12.1903(2)(d), an applicant's plans may not adversely affect other water rights dependent upon return flows, evaluated by identifying the likely receiving stream and determining monthly volumes of water that infiltrate past the root zone for irrigation. Return flows from the Applicant's field are assumed to return to the Bitterroot River as it is deeper, wider, and penetrates the aquifer to a greater depth. In a Return Flow Report from Department Hydrogeologist, Russell Levens, return flows totaling 7.70 AF from the Applicant's historically irrigated 10.4 were modeled using the Alluvial Water Accounting System (AWAS). Using AQTESOV© and the Hantush (1967) analytical model groundwater recharge from seepage out of the proposed ponds was also calculated in order to determine if the loss of return flows was offset by pond seepage. According to the report, the ponds and retired irrigated acreage are the same distance to the Bitterroot River, so the return flow amounts and timing will be the same as long as sufficient water is delivered to the ponds and groundwater mounding associated with recharge from the ponds does not exceed the available freeboard in the ponds. The modeling found groundwater mounding from pond seepage of 0.54 feet at the end of the irrigation season and an available 10 feet of freeboard from the pond bottom to the static groundwater level. Due to the fact that water will seep out of the pond bottoms, the seepage from the ponds will replace lost return flows in both amount and timing, resulting in no adverse effect to Bitterroot River water users who were historically reliant on return flows from the Applicant's 10.4 acres.

39. The initial filling of the reservoirs will occur each spring once waste and seepage water begins flowing in the Applicant's ditch. Once the reservoirs are filled, inflows will match outflows and water will continue down the ditch past the ponds as historically occurred. Upon the end of the irrigation season water will cease to flow into the recreation and stock reservoirs and the ponds will drain naturally through seepage and remain dry through the winter months until the next irrigation season. There are no other water users on the ditch downgradient of the ponds that could be adversely affected. The Applicant has the ability to open the reservoir slide gates to release water downstream if a "call" for water is made.

40. The Supply Ditch Association will continue to control, manage and deliver water to its users as it has in the past. The Department is not conditioning this change with a measurement requirement due to the presence of a water commissioner for Supply Ditch Association and the

Applicant's position as the last user on the ditch from which he receives his share of the Supply Ditch water and waste and seepage water.

BENEFICIAL USE

FINDINGS OF FACT

41. Applicant seeks to change his portion of Statement of Claim No. 76H-5200-00 by adding three places of storage, reducing the place of use for irrigation and adding the purposes of recreation and stock. The volume of water changed is 14.3 AF, which will allow for one fill and evaporation from the reservoirs for recreation at 14.14 AF and 0.14 AF for stock watering. The combined capacity of the storage reservoirs is 7.69 AF, with individual capacities being 6.40 AF, 1.05 AF and 0.24 AF. Pond evaporation was calculated to be 6.45 AF and is included in the volume listed for recreation. Stock watering volume of 0.14 AF is based on DNRC standards of 0.17 AF per year per animal unit for 18 animal units over a period of 163 days (May 1 to October 15). The amount of water requested is the minimum amount required for one fill and to account for evaporation from May 1 to October 15 annually. The volume requested is based on the capacity of the existing reservoirs that were built by the previous land owner.

42. The Department finds irrigation, stock and recreation to be a beneficial use under § 85.2.102(4)(a), MCA. The requested volume of 14.3 AF is reasonable for the intended beneficial uses.

ADEQUATE DIVERSION

FINDINGS OF FACT

43. The means of diversion for the recreation and stock reservoirs consists of earthen dams built across a natural swale. The Applicant's irrigation ditch historically drained through this swale in a westerly direction and the reservoirs were built across this ditch. Each reservoir will have a slide gate and standpipe to allow water to flow freely from one reservoir to the next once the reservoirs are filled. The slide gates will also allow for the reservoirs to be drained. The reservoirs have been in existence since before 1995 and have operated adequately since

that time. Applicant proposes to add a place of storage, add the purpose of stock and recreation and retire 10.4 irrigated acres from his portion of Statement of Claim 76H-5200. The Applicant will continue to use the full flow rate and diverted volume to provide for the continued irrigation of 8.9 acres and to account for one fill and evaporation from the 2.6 acre reservoirs. The reservoirs are located along a lateral ditch that delivers water from the Supply Ditch Association diversion and the Applicant is the last user on the ditch. The reservoir will fill early in the irrigation season as water moves through the irrigation ditch system.

44. Diversion from the ditch system to irrigate the Applicant's remaining 8.9 acres will be done using a Cornell 3500, 15 horse power pump with a variable pressure and return flow valves. The pump is used to run a wheel line with 32 9/64" heads. The heads at the 35 psi are rated to deliver a maximum of 3.39 GPM which is 108.5 GPM. The Supply Ditch shares total 10 inches or 111.2 GPM for the Applicant's portion of the remaining acres. The pump curve for the 15 HP pump being used was provided and indicates that it is capable of delivering the flow rate requested for irrigation.

POSSESSORY INTEREST

FINDINGS OF FACT

45. The Applicant signed the affidavit on the application form affirming the Applicant has possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. (Department file)

CONCLUSIONS OF LAW

HISTORIC USE AND ADVERSE EFFECT

46. Montana's change statute codifies the fundamental principles of the Prior Appropriation Doctrine. Sections 85-2-401 and -402(1)(a), MCA, authorize changes to existing water rights, permits, and water reservations subject to the fundamental tenet of Montana water law that one may change only that to which he or she has the right based upon beneficial use. A change to an existing water right may not expand the consumptive use of the underlying right or remove

the well-established limit of the appropriator's right to water actually taken and beneficially used. An increase in consumptive use constitutes a new appropriation and is subject to the new water use permit requirements of the MWUA. McDonald v. State, 220 Mont. 519, 530, 722 P.2d 598, 605 (1986)(beneficial use constitutes the basis, measure, and limit of a water right); Featherman v. Hennessy, 43 Mont. 310, 316-17, 115 P. 983, 986 (1911)(increased consumption associated with expanded use of underlying right amounted to new appropriation rather than change in use); Quigley v. McIntosh, 110 Mont. 495, 103 P.2d 1067, 1072-74 (1940)(appropriator may not expand a water right through the guise of a change – expanded use constitutes a new use with a new priority date junior to intervening water uses); Allen v. Petrick, 69 Mont. 373, 222 P. 451(1924)(“quantity of water which may be claimed lawfully under a prior appropriation is limited to that quantity within the amount claimed which the appropriator has needed, and which within a reasonable time he has actually and economically applied to a beneficial use. . . . it may be said that the principle of beneficial use is the one of paramount importance . . . The appropriator does not own the water. He has a right of ownership in its use only”); Town of Manhattan, at ¶ 10 (an appropriator's right only attaches to the amount of water actually taken and beneficially applied); Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, Pg. 9 (2011)(the rule that one may change only that to which it has a right is a fundamental tenet of Montana water law and imperative to MWUA change provisions); In the Matter of Application to Change a Water Right No. 41I 30002512 by Brewer Land Co, LLC, DNRC Proposal For Decision and Final Order (2004).¹

47. Sections 85-2-401(1) and -402(2)(a), MCA, codify the prior appropriation principles that Montana appropriators have a vested right to maintain surface and ground water conditions substantially as they existed at the time of their appropriation; subsequent appropriators may insist that prior appropriators confine their use to what was actually appropriated or necessary for their originally intended purpose of use; and, an appropriator may not change or alter its use in a manner that adversely affects another water user. Spokane Ranch & Water Co. v. Beatty, 37 Mont. 342, 96 P. 727, 731 (1908); Quigley, 110 Mont. at 505-11, 103 P.2d at 1072-74;

¹ DNRC decisions are available at:
http://www.dnrc.mt.gov/wrd/water_rts/hearing_info/hearing_orders/hearingorders.asp

Matter of Royston, 249 Mont. at 429, 816 P.2d at 1057; Hohenlohe, at ¶¶43-45.²

48. The cornerstone of evaluating potential adverse effect to other appropriators is the determination of the “historic use” of the water right being changed. Town of Manhattan, at ¶10 (recognizing that the Department’s obligation to ensure that change will not adversely affect other water rights requires analysis of the actual historic amount, pattern, and means of water use). A change applicant must prove the extent and pattern of use for the underlying right proposed for change through evidence of the historic diverted amount, consumed amount, place of use, pattern of use, and return flow because a statement of claim, permit, or decree may not include the beneficial use information necessary to evaluate the amount of water available for change or potential for adverse effect.³ A comparative analysis of the historic use of the water right to the proposed change in use is necessary to prove the change will not result in expansion of the original right, or adversely affect water users who are entitled to rely upon maintenance of conditions on the source of supply for their water rights. Quigley, 103 P.2d at 1072-75 (it is necessary to ascertain historic use of a decreed water right to determine whether a change in use expands the underlying right to the detriment of other water user because a decree only provides a limited description of the right); Royston, 249 Mont. at 431-32, 816 P.2d at 1059-60 (record could not sustain a conclusion of no adverse effect because the applicant failed to provide the Department with evidence of the historic diverted volume, consumption, and return flow); Hohenlohe, at ¶44-45; Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, Pgs. 11-12 (proof of historic use is required even when the right has been decreed because the decreed flow rate or volume establishes the maximum appropriation that may be diverted, and may exceed the historical pattern of use, amount diverted or amount consumed

² See also Holmstrom Land Co., Inc., v. Newlan Creek Water District, 185 Mont. 409, 605 P.2d 1060 (1979); Lokowich v. Helena, 46 Mont. 575, 129 P. 1063(1913); Thompson v. Harvey, 164 Mont. 133, 519 P.2d 963 (1974)(plaintiff could not change his diversion to a point upstream of the defendants because of the injury resulting to the defendants); McIntosh v. Graveley, 159 Mont. 72, 495 P.2d 186 (1972)(appropriator was entitled to move his point of diversion downstream, so long as he installed measuring devices to ensure that he took no more than would have been available at his original point of diversion); Head v. Hale, 38 Mont. 302, 100 P. 222 (1909)(successors of the appropriator of water appropriated for placer mining purposes cannot so change its use as to deprive lower appropriators of their rights, already acquired, in the use of it for irrigating purposes); and, Gassert v. Noyes, 18 Mont. 216, 44 P. 959(1896)(change in place of use was unlawful where reduced the amount of water in the source of supply available which was subject to plaintiff’s subsequent right).

³ A claim only constitutes *prima facie* evidence for the purposes of the adjudication under § 85-2-221, MCA. The claim does not constitute *prima facie* evidence of historical use in a change proceeding under §85-2-402, MCA. For example, most water rights decreed for irrigation are not decreed with a volume and provide limited evidence of actual historic beneficial use. §85-2-234, MCA

through actual use); Matter of Application For Beneficial Water Use Permit By City of Bozeman, Memorandum, Pgs. 8-22 (Adopted by DNRC *Final Order* January 9, 1985)(evidence of historic use must be compared to the proposed change in use to give effect to the implied limitations read into every decreed right that an appropriator has no right to expand his appropriation or change his use to the detriment of juniors).⁴

49. An applicant must also analyze the extent to which a proposed change may alter historic return flows for purposes of establishing that the proposed change will not result in adverse effect. The requisite return flow analysis reflects the fundamental tenant of Montana water law that once water leaves the control of the original appropriator, the original appropriator has no right to its use and the water is subject to appropriation by others. E.g., Hohenlohe, at ¶44; Rock Creek Ditch & Flume Co. v. Miller, 93 Mont. 248, 17 P.2d 1074, 1077 (1933); Newton v. Weiler, 87 Mont. 164, 286 P. 133(1930); Popham v. Holloron, 84 Mont. 442, 275 P. 1099, 1102 (1929); Galiger v. McNulty, 80 Mont. 339, 260 P. 401 (1927); Head v. Hale, 38 Mont. 302, 100 P. 222 (1909); Spokane Ranch & Water Co., 37 Mont. at 351-52, 96 P. at 731; Hidden Hollow Ranch v. Fields, 2004 MT 153, 321 Mont. 505, 92 P.3d 1185; In the Matter of Application for Change Authorization No. G (W)028708-411 by Hedrich/Straugh/Ringer, DNRC Final Order (Dec. 13, 1991); In the Matter of Application for Change Authorization No. G(W)008323-G76l By Starkel/Koester, DNRC Final Order (Apr. 1, 1992); In the Matter of Application to Change a

⁴ Other western states likewise rely upon the doctrine of historic use as a critical component in evaluating changes in appropriation rights for expansion and adverse effect: Pueblo West Metropolitan District v. Southeastern Colorado Water Conservancy District, 717 P.2d 955, 959 (Colo. 1986)(“[O]nce an appropriator exercises his or her privilege to change a water right ... the appropriator runs a real risk of requantification of the water right based on actual historical consumptive use. In such a change proceeding a junior water right ... which had been strictly administered throughout its existence would, in all probability, be reduced to a lesser quantity because of the relatively limited actual historic use of the right.”); Santa Fe Trail Ranches Property Owners Ass'n v. Simpson, 990 P.2d 46, 55 -57 (Colo., 1999); Farmers Reservoir and Irr. Co. v. City of Golden, 44 P.3d 241, 245 (Colo. 2002)(“We [Colorado Supreme Court] have stated time and again that the need for security and predictability in the prior appropriation system dictates that holders of vested water rights are entitled to the continuation of stream conditions as they existed at the time they first made their appropriation”); Application for Water Rights in Rio Grande County, 53 P.3d 1165, 1170 (Colo. 2002); Wyo. Stat. § 41-3-104 (When an owner of a water right wishes to change a water right ... he shall file a petition requesting permission to make such a change The change ... may be allowed provided that the quantity of water transferred ... shall not exceed the amount of water historically diverted under the existing use, nor increase the historic rate of diversion under the existing use, nor increase the historic amount consumptively used under the existing use, nor decrease the historic amount of return flow, nor in any manner injure other existing lawful appropriators.); Basin Elec. Power Co-op. v. State Bd. of Control, 578 P.2d 557, 564 -566 (Wyo., 1978) (a water right holder may not effect a change of use transferring more water than he had historically consumptively used; regardless of the lack of injury to other appropriators, the amount of water historically diverted under the existing use, the historic rate of diversion under the existing use, the historic amount consumptively used under the existing use, and the historic amount of return flow must be considered.)

Water Right No. 41I 30002512 by Brewer Land Co, LLC, DNRC Proposal For Decision and Final Order (2004); Admin. R.M. 36.12.101(56)(Return flow - that part of a diverted flow which is not consumed by the appropriator and returns underground to its original source or another source of water - is not part of a water right and is subject to appropriation by subsequent water users).⁵

50. Although the level of analysis may vary, analysis of the extent to which a proposed change may alter the amount, location, or timing return flows is critical in order to prove that the proposed change will not adversely affect other appropriators who rely on those return flows as part of the source of supply for their water rights. Royston, 249 Mont. at 431, 816 P.2d at 1059-60; Hohenlohe, at ¶¶ 45-6 and 55-6; Spokane Ranch & Water Co., 37 Mont. at 351-52, 96 P. at 731. Noted Montana Water Law scholar Al Stone explained that the water right holder who seeks to change a water right is unlikely to receive the full amount claimed or historically used at the original place of use due to reliance upon return flows by other water users. Montana Water Law, Albert W. Stone, Pgs. 112-17 (State Bar of Montana 1994).

51. In Royston, the Montana Supreme Court confirmed that an applicant is required to prove lack of adverse effect through comparison of the proposed change to the historic use, historic consumption, and historic return flows of the original right. 249 Mont. at 431, 816 P.2d at 1059-60. More recently, the Montana Supreme Court explained the relationship between the fundamental principles of historic beneficial use, return flow, and the rights of subsequent appropriators as they relate to the adverse effect analysis in a change proceeding in the following manner:

The question of adverse effect under §§ 85-2-402(2) and -408(3), MCA, implicates return flows. A change in the amount of return flow, or to the hydrogeologic pattern of return flow, has the potential to affect adversely downstream water rights. There consequently exists an inextricable link between the “amount historically consumed” and the water that re-enters the stream as return flow. . . .

An appropriator historically has been entitled to the greatest quantity of water he can put to use. The requirement that the use be both beneficial and reasonable, however, proscribes this tenet. This limitation springs from a fundamental tenet of western water law-that an appropriator has a right only to that amount of water

⁵ The Montana Supreme Court recently recognized the fundamental nature of return flows to Montana’s water sources in addressing whether the Mitchell Slough was a perennial flowing stream, given the large amount of irrigation return flow which feeds the stream. The Court acknowledged that the Mitchell’s flows are fed by irrigation return flows available for appropriation. Bitterroot River Protective Ass’n, Inc. v. Bitterroot Conservation Dist. 2008 MT 377, ¶¶ 22, 31, 43, 346 Mont. 508, ¶¶ 22, 31,43, 198 P.3d 219, ¶¶ 22, 31,43(citing Hidden Hollow Ranch v. Fields, 2004 MT 153, 321 Mont. 505, 92 P.3d 1185).

historically put to beneficial use-developed in concert with the rationale that each subsequent appropriator “is entitled to have the water flow in the same manner as when he located,” and the appropriator may insist that prior appropriators do not affect adversely his rights.

This fundamental rule of Montana water law has dictated the Department’s determinations in numerous prior change proceedings. The Department claims that historic consumptive use, as quantified in part by return flow analysis, represents a key element of proving historic beneficial use.

We do not dispute this interrelationship between historic consumptive use, return flow, and the amount of water to which an appropriator is entitled as limited by his past beneficial use.

Hohenlohe, at ¶¶ 42-45 (internal citations omitted).

52. The Department’s rules reflect the above fundamental principles of Montana water law and are designed to itemize the type evidence and analysis required for an applicant to meet its burden of proof. Admin.R.M. 36.12.1901 through 1903. These rules forth specific evidence and analysis required to establish the parameters of historic use of the water right being changed. Admin.R.M. 36.12.1901 and 1902. The rules also outline the analysis required to establish a lack of adverse effect based upon a comparison of historic use of the water rights being changed to the proposed use under the changed conditions along with evaluation of the potential impacts of the change on other water users caused by changes in the amount, timing, or location of historic diversions and return flows. Admin.R.M. 36.12.1901 and 1903.

53. Applicant seeks to change existing water rights represented by its Water Right Claims. The “existing water rights” in this case are those as they existed prior to July 1, 1973, because with limited exception, no changes could have been made to those rights after that date without the Department’s approval. Analysis of adverse effect in a change to an “existing water right” requires evaluation of what the water right looked like and how it was exercised prior to July 1, 1973. In McDonald v. State, the Montana Supreme Court explained:

54. The foregoing cases and many others serve to illustrate that what is preserved to owners of appropriated or decreed water rights by the provision of the 1972 Constitution is what the law has always contemplated in this state as the extent of a water right: such amount of water as, by pattern of use and means of use, the owners or their predecessors put to beneficial use. . . . the Water Use Act contemplates that all water rights, regardless of prior statements or claims as to amount, must nevertheless, to be

recognized, pass the test of historical, unabandoned beneficial use. . . . To that extent only the 1972 constitutional recognition of water rights is effective and will be sustained.

220 Mont. at 529, 722 P.2d at 604; see also Matter of Clark Fork River Drainage Area, 254 Mont. 11, 17, 833 P.2d 1120 (1992).

55. Water Resources Surveys were authorized by the 1939 legislature. 1939 Mont. Laws Ch. 185, § 5. Since their completion, Water Resources Surveys have been invaluable evidence in water right disputes and have long been relied on by Montana courts. In re Adjudication of Existing Rights to Use of All Water in North End Subbasin of Bitterroot River Drainage Area in Ravalli and Missoula Counties, 295 Mont. 447, 453, 984 P.2d 151, 155 (1999)(Water Resources Survey used as evidence in adjudicating of water rights); Wareing v. Schreckendgust, 280 Mont. 196, 213, 930 P.2d 37, 47 (1996)(Water Resources Survey used as evidence in a prescriptive ditch easement case); Olsen v. McQueary, 212 Mont. 173, 180, 687 P.2d 712, 716 (1984) (judicial notice taken of Water Resources Survey in water right dispute concerning branches of a creek).

56. While evidence may be provided that a particular parcel was irrigated, the actual amount of water historically diverted and consumed is critical. E.g., In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC., DNRC Proposal for Decision adopted by Final Order (2005). The Department cannot assume that a parcel received the full duty of water or that it received sufficient water to constitute full service irrigation for optimum plant growth. Even when it seems clear that no other rights could be affected solely by a particular change in the location of diversion, it is essential that the change also not enlarge an existing right. See MacDonald, 220 Mont. at 529, 722 P.2d at 604; Featherman, 43 Mont. at 316-17, 115 P. at 986; Trail's End Ranch, L.L.C. v. Colorado Div. of Water Resources 91 P.3d 1058, 1063 (Colo., 2004).

57. The Department has adopted a rule providing for the calculation of historic consumptive use where the applicant proves by a preponderance of the evidence that the acreage was historically irrigated. Admin. R. M. 36.12.1902 (16). In the alternative an applicant may present its own evidence of historic beneficial use. In this case Applicant has elected to proceed under Admin. R.M. 36.12.1902. (FOF Nos. 28 - 29).

58. Based upon the Applicant's evidence of historic use, the Applicant has proven by a preponderance of the evidence the historic use of Water Right Claim No. 76H-5200-00 of 51.5

AF diverted volume and 1.52 CFS flow rate with a consumptive use of 33.4 acre-feet. (FOF Nos. 19, 27 & 31)

59. Based upon the Applicant's comparative analysis of historic water use and return flows to water use and return flows under the proposed change, the Applicant has proven that the proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued. §85-2-402(2)(b), MCA. (FOF Nos. 33 - 40)

BENEFICIAL USE

60. A change applicant must prove by a preponderance of the evidence the proposed use is a beneficial use. §§85-2-102(4) and -402(2)(c), MCA. Beneficial use is and has always been the hallmark of a valid Montana water right: "[T]he amount actually needed for beneficial use within the appropriation will be the basis, measure, and the limit of all water rights in Montana . . ." McDonald, 220 Mont. at 532, 722 P.2d at 606. The analysis of the beneficial use criterion is the same for change authorizations under §85-2-402, MCA, and new beneficial permits under §85-2-311, MCA. Admin.R.M. 36.12.1801. The amount of water that may be authorized for change is limited to the amount of water necessary to sustain the beneficial use. E.g., Bitterroot River Protective Association v. Siebel, *Order on Petition for Judicial Review*, Cause No. BDV-2002-519, Montana First Judicial District Court (2003) (*affirmed on other grounds*, 2005 MT 60, 326 Mont. 241, 108 P.3d 518); Worden v. Alexander, 108 Mont. 208, 90 P.2d 160 (1939); Allen v. Petrick, 69 Mont. 373, 222 P. 451(1924); Sitz Ranch v. DNRC, DV-10-13390, Montana Fifth Judicial District Court, *Order Affirming DNRC Decision*, Pg. 3 (2011)(citing BRPA v. Siebel, 2005 MT 60, and rejecting applicant's argument that it be allowed to appropriate 800 acre-feet when a typical year would require 200-300 acre-feet); Toohey v. Campbell, 24 Mont. 13, 60 P. 396 (1900)("The policy of the law is to prevent a person from acquiring exclusive control of a stream, or any part thereof, not for present and actual beneficial use, but for mere future speculative profit or advantage, without regard to existing or contemplated beneficial uses. He is restricted in the amount that he can appropriate to the quantity needed for such beneficial purposes."); §85-2-312(1)(a), MCA (DNRC is statutorily prohibited from issuing a permit for more water than can be beneficially used).

61. Applicant proposes to use water for stock and recreation, in addition to the historic irrigation, which are recognized beneficial uses. §85-2-102(4), MCA. Applicant has proven by a preponderance of the evidence stock and recreation are a beneficial use and that 14.3 AF of diverted volume of water requested is the amount needed to sustain the beneficial uses. §85-2-402(2)(c), MCA (FOF No. 41)

ADEQUATE MEANS OF DIVERSION

62. Pursuant to §85-2-402 (2)(b), MCA, the Applicant must prove by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate. This codifies the prior appropriation principle that the means of diversion must be reasonably effective for the contemplated use and may not result in a waste of the resource. Crowley v. 6th Judicial District Court, 108 Mont. 89, 88 P.2d 23 (1939); In the Matter of Application for Beneficial Water Use Permit No. 41C-11339900 by Three Creeks Ranch of Wyoming LLC (DNRC Final Order 2002)(information needed to prove that proposed means of diversion, construction, and operation of the appropriation works are adequate varies based upon project complexity; design by licensed engineer adequate).

63. Pursuant to §85-2-402 (2)(b), MCA, applicant has proven by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate for the proposed beneficial use. (FOF No. 43)

POSSESSORY INTEREST

64. Pursuant to §85-2-402(2)(d), MCA, the Applicant must prove by a preponderance of the evidence that it has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. See also Admin.R.M. 36.12.1802

65. The Applicant has proven by a preponderance of the evidence that it has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. (FOF No. 45)

PRELIMINARY DETERMINATION

Subject to the terms and analysis in this Preliminary Determination Order, the Department preliminarily determines that this Application to Change Water Right No. 76H-30103343 should be granted subject to the following.

Applicant may permanently add three places of storage and change a portion of the place of use for irrigation of Statement of Claim No. 76H-5200-00. The Applicant may permanently add three reservoirs with individual capacities being 6.40 AF, 1.05 AF and 0.24 AF and reduce the total irrigated area from 39.3 acres to 28.9 acres. The storage reservoirs and irrigated acres are all located in the SWSW of Section 1, T9N, R20W, Ravalli County. The Applicant may continue to divert 1.52 CFS up to 51.5 AF from the original point of diversion from April 15th to October 15th, annually. The purpose for Statement of Claim No. 76H-5200-00 will be changed to include 14.16 AF of water for recreation and 0.14 AF of water for stock.

NOTICE

This Department will provide public notice of this Application and the Department's Preliminary Determination to Grant pursuant to §85-2-307, MCA. The Department will set a deadline for objections to this Application pursuant to §§85-2-307, and -308, MCA. If this Application receives a valid objection, it will proceed to a contested case proceeding pursuant to Title 2 Chapter 4 Part 6, MCA, and §85-2-309, MCA. If this Application receives no valid objection or all valid objections are unconditionally withdrawn, the Department will grant this Application as herein approved. If this Application receives a valid objection(s) and the valid objection(s) are conditionally withdrawn, the Department will consider the proposed condition(s) and grant the Application with such conditions as the Department decides necessary to satisfy the applicable criteria. E.g., §§85-2-310, -312, MCA.

DATED this 11th day of January, 2017.

/Original signed by Jim Nave/
Jim Nave, Regional Manager
Missoula Regional Office
Department of Natural Resources
and Conservation

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the PRELIMINARY DETERMINATION TO GRANT was served upon all parties listed below on this 11th day of January 2017, by first class United States mail.

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